LEE CHUAN GUAN HARDWARE SDN BHD

v.

HULEE ENGINEERING SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-399 OF 1998]
29 JANUARY 2000

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Filing and service - Rules of the High Court 1980, O. 32 r. 13(2)(b) - Whether 14-day time period to file applies to affidavit in reply to summary judgment application - Whether affidavit in reply ought to be considered if time frame expired*

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Filing and service done within time by all defendants except one - Whether such defendant may subsequently join other defendants to reply to plaintiff's subsequent affidavit - Whether such defendant deemed not to be party to exchanges of affidavits - Whether such defendant has right to reply to subsequent affidavits due to failure to reply to plaintiff's first affidavit - Rules of the High Court 1980, O. 32 r. 13(2)(b)*

Further to its application for summary judgment, the plaintiff served on all the defendants a supporting affidavit ('the supporting affidavit'). In response, the second to the sixth defendants served on the plaintiff an affidavit in reply. No affidavit in reply was filed by the first defendant. The plaintiff responded by filing an affidavit in reply to the second to the sixth defendants' affidavit in reply. Subsequently, the first to the sixth defendants served on the plaintiff another affidavit in reply ('the said affidavit in reply'). At the hearing of the summary judgment application, the plaintiff objected to the admissibility of the said affidavit in reply. The ground for objecting was that the first defendant had not complied with O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('the RHC') in that the said affidavit in reply was not filed and served on the plaintiff within 14 days from the date on which the supporting affidavit, in respect of which the first defendant intended to reply, was served on the first defendant. The senior assistant registrar did not admit the said affidavit in reply and thus the first defendant appealed. The issue before the court was whether the said affidavit in reply which was filed outside the 14-day time frame provided under O. 32 r. 13(2)(b) of the RHC was rightly excluded in so far as the first defendant was concerned.

Held:

[1] Order 32 r. 13(2)(b) of the RHC is applicable to an affidavit in reply in a summary judgment application. If the 14-day time frame is not complied with, the affidavit in reply ought to be excluded in considering a summary judgment application. Order 32 r. 13 of the RHC was amended to include a new sub-rule (2) and this new amendment made it mandatory for legal practitioners to abide dutifully in regard to the time frame for filing and serving an affidavit in reply, in particular, in the context of a summary judgment application.

[2] The said affidavit in reply, in so far as the first defendant was concerned, ought not to be considered in the plaintiff's application for summary judgment because the first defendant had breached O. 32 r. 13(2)(b) of the RHC in that it had failed to file the said affidavit in reply within 14 days from the date the plaintiff's supporting affidavit was served on the first defendant. The first defendant also did not apply either orally or formally for an extension of time to file the said affidavit in reply.

[3] The first defendant was not a party to the exchanges of the affidavit in reply between the plaintiff and the second to the sixth defendants because the first defendant did not reply to the supporting affidavit. Therefore, the first defendant could not argue that the said affidavit in reply was purportedly filed in reply to the plaintiff's affidavit in reply which was filed by the plaintiff in reply to the affidavit in reply by the second to the sixth defendants.

[4] The first defendant must be considered a stranger and consequently, it had no right to reply due to its failure from the very beginning to reply to the supporting affidavit. The plaintiff's subsequent affidavit in reply was not served on the first defendant but rather on the second to the sixth defendants and thus it could not be responded upon by the first defendant by way of the said affidavit in reply. To allow the first defendant to reply to the supporting affidavit at this juncture would tantamount to opening the floodgates. Otherwise, in cases where there are several defendants, a defendant who does not file any reply to a plaintiff's initial affidavit may subsequently, at his whim and fancy, join the other defendants to reply to the plaintiff's subsequent affidavit to which he is not a party and thereby completely disregard the clear and unambiguous provisions of O. 32 r. 13(2)(b) of the RHC.

[Appeal dismissed.]

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***

Elite Jewellers Sdn Bhd v. Wong Tim Kai [1998] 3 CLJ Supp 115 ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

PB Securities Sdn Bhd v. Abdul Rashid Mohamed [1994] 3 CLJ 209

Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors [1996] 4 CLJ 461 ***(foll)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(foll)***

Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(refd)***

Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(dist)***

Wing Tiek Holdings Bhd v. Yong Chee Thiam & Anor [1994] 3 MLJ 379 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 32 r. 13(2)(b)

For the plaintiff - Reginald Vallipuram; M/s Reginald Vallipuram & Co
For the 1st defendant - Wong Hau Lik; M/s Wong Hau Lik

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal by the first defendant/appellant (hereinafter referred to as the "first defendant") to the judge in chambers in encl. 29 against the decision of the learned senior assistant registrar ("SAR") who excluded the admissibility of the affidavit in reply of the first defendant during the hearing of the plaintiff's/respondent's (hereinafter referred to as the "plaintiff") O. 14 of the Rules of the High Court 1980 ("RHC") application that was scheduled for hearing on 9 November 1998 before the SAR. During the hearing of the O. 14 application, the plaintiff raised by way of a preliminary objection the admissibility of the first defendant's affidavit in reply in encl. 11B on the ground that the first defendant had failed to comply with the time frame as stipulated in O. 32 r. 13(2)(b) of the RHC in that and in particular that the affidavit in reply in encl. 11B was not filed and served on the plaintiff within 14 days from the date on which the plaintiff's supporting affidavit in encl. 6 in respect of which the first defendant intended to reply was served on the first defendant.

Chronology Of Events Extracted From The Court File

(1) The O. 14 application in encl. 7 dated 18 August 1998 and the supporting affidavit in encl. 6 sworn by Lee Chan Meng on 17 August 1998 were jointly filed by the plaintiff on 18 August 1998 and served on the first to the sixth defendants on the following day namely 19 August 1998 by way of a courier service.

(2) On 26 August 1998, the plaintiff filed a further affidavit in encl. 9 that was sworn by Lee Chan Meng on 26 August 1998 and not 28 August 1998 as suggested and encl. 9 was served on the first to the sixth defendants on the following day meaning on 29 August 1998 by way of a courier service.

(3) On 11 September 1998, the second to the sixth defendants served on the plaintiff their affidavit in reply sworn by Chan Har @ Chan Fook Khim on 9 September 1998 as seen in encl. 11 and it was filed in response to encl. 6.

(4) No affidavit in reply was filed by the first defendant to respond to encl. 6.

(5) On 21 October 1998, the plaintiff filed their affidavit in reply in encl. 11A that was sworn by Lee Chan Meng on 20 October 1998 and not 20 August 1998 as suggested and encl. 11A was served on the second to the sixth defendants on the following day by courier service.

(6) An affidavit in reply of the first defendant to the sixth defendants sworn by Chan Har @ Chan Fook Khim on 3 November 1998 as seen in encl. 11B was served on the plaintiff on 5 November 1998. Enclosure 11B was filed on 9 November 1998.

Now, the appeal in encl. 29 was entirely pivoted on the issue of the admissibility of the disputed affidavit in reply in encl. 11B in so far as the first defendant was concerned.

The Order 14 Application In Enclosure 7

For fear of repetition, it must be emphasised that the O. 14 application was scheduled to be heard on 9 November 1998 and on that date the plaintiff raised a simple preliminary objection in regard to the admissibility of the first defendant's affidavit in reply in encl. 11B that was affirmed by Chan Har @ Chan Fook Khim for all the defendants and that must necessarily include the first defendant. That preliminary objection was on this point: that the first defendant had failed to comply with the provisions

of O. 32 r. 13(2)(b) of the RHC when filing encl. 11B because the first defendant had failed to file its reply to the plaintiff's supporting affidavit in encl. 6 within 14 days from the date when encl. 6 was served on the first defendant. In other words, the first defendant did not respond to encl. 6 within the prescribed time and the first defendant in an attempt to circumvent the law joined forces with the other defendants and filed encl. 11B purportedly to reply to encl. 6. Calculation wise encl. 11B was filed some 77 days after encl. 6 was served on the first defendant and this was in clear violation of O. 32 r. 13(2)(b) of the RHC. In its original text, O. 32 r. 13(2)(b) of the RHC reads as follows:

> Save as otherwise provided in these rules –
>
> (a) ...
>
> (b) A party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

The law books are replete with authorities on the interpretation of O. 32 r. 13(2)(b) of the RHC. I will now endeavour to examine and highlight some of these authorities.

Shaik Daud J (now JCA) in *Wing Tiek Holdings Bhd v. Yong Chee Thiam & Anor* [1994] 3 MLJ 379, particularly at p. 382 construed strictly O. 32 r. 13(2)(b) of the RHC in these words:

> In the present case since the affidavit in reply by the second defendant was filed and served on the plaintiff's solicitors on 8 June 1994, well beyond the 14-day limit provided for by rule 13(2), I hold that it had violated this provision. It is my view that pursuant to rule 13(2), all affidavits-in-reply to Order 14 applications must comply with Order 32 rule 13(2)(b), failing which they ought not to be considered.

In *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, the Court of Appeal speaking through Siti Norma Yaakob JCA decided, albeit *obiter*, that O. 32 r. 13(2)(b) of the RHC was applicable to an affidavit in reply in an O. 14 application and thus it confirmed the decision of Shaik Daud J (now JCA) in *Wing Tiek Holdings Bhd v. Yong Chee Thiam (supra)* as a correct exposition of the law on the applicability of O. 14 proceedings. Be that as it may, it must be pointed out that *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong (supra)* decided on the application to set aside the writ and the statement of claim.

In a robust approach, the Court of Appeal continued to blaze a trail for others to follow. In *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors* [1996] 4 CLJ 461; [1997] 1 MLJ 453 CA, Mahadev Shankar JCA (as he then was) speaking for the Court of Appeal held that O. 32 r. 13(2)(b) of the RHC was applicable to affidavit in reply in an O. 14 application and this was what his Lordship said (see p. 466 of the report):

> By PU(A) 192/93 on 1 August 1993, Order 32 rule 13 of the RHC was amended by the addition of a new sub-rule (2) which made it mandatory for a party who was served with an affidavit in support of an application to file and serve his affidavit in reply within 14 days of the service of the affidavit in support of the application. Finego's solicitors did not comply with this rule. On 6 June 1994, a director of Finego by (the) name of Eng Keng Ho ('Eng') affirmed an affidavit in reply challenging the claim of the plaintiffs. It was filed and served on the same day, but at the hearing the next day, plaintiffs' counsel objected to its admissibility. Azmel J refused to allow it to be used.

On the strength of these time honoured authorities, it would be abundantly clear that O. 32 r. 13(2)(b) of the RHC is applicable to an affidavit in reply in an O. 14 application and that if the 14 days' time frame is not complied with the affidavit in reply ought to be excluded in considering an O. 14 application.

The Court of Appeal in *Pemunya Kapal MV Brihope & Ors (supra)* rigidly applied the provisions of O. 32 r. 13(2)(b) of the RHC and at p. 470 of the report, Mahadev Shankar JCA (as he then was) speaking for the Court of Appeal had this to say:

> Order 32 rule 13 (2) of the RHC was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory. Of course, the court always has a discretionary power to extend time (see the Courts of Judicature Act 1964 item 8 of the Schedule and Order 3 rule 5 of the RHC 1980). But very powerful reasons must be advanced and the application for an extension should preferably be filed before time expired (in this case on 13 May or well before 7 June).

Strict compliance with the rules was reiterated in the case of *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399, and, at p. 408 to p. 409 of the report, I had occasion to make the following observations:

> From the authorities both foreign and local, two distinct principles can be garnered. The first principle is the time honoured principle that the rules of Court and the associated rules of practice, devised by the Rules Committee and developed by the Courts over the years to promote the expeditious despatch of litigation must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto. This time honoured principle is reflected in a series of rules giving the Court a discretion to dismiss on failure to comply with a time limit. Thus, Order 19 rule 1 of the RHC (default in service of statement of claim), Order 24 rule 16(1) of the RHC (failure to comply with requirement for discovery etc), Order 25 rule 1(4) of the RHC (failure of plaintiff to take out summons for directions, then the defendant may apply to dismiss the action), Order 28 rule 10(1) of the RHC (failure to prosecute proceedings with despatch), and Order 34 rule 2(2) of the RHC (failure of the plaintiff to set down action for trial, the defendant may set down the action for trial or may apply to the Court to dismiss the action for want of prosecution) are some examples set by the Rules Committee.

and the same case was also reported in the popular Malayan Law Journal *vide* [1996] 5 MLJ 241.

Now, in so far as the O. 14 application was concerned, only the second to the sixth defendants replied to the plaintiff's supporting affidavit in encl. 6 by filing encl. 11. The plaintiff in turn responded and replied to encl. 11 by filing encl. 11A.

This was followed by the filing of encl. 11B sworn by Chan Har @ Chan Fook Khim – the second defendant, on behalf of himself and the rest of the defendants including the first defendant. As I said, encl. 11B was filed and served on the plaintiff on 5 November 1998 – some 77 days after the plaintiff's supporting affidavit in encl. 6 was filed and served to all the defendants herein, namely the first to the sixth defendants. In my judgment, encl. 11B in so far as the first defendant was concerned ought to be excluded in the plaintiff's O. 14 application on the following grounds:

(a) The first defendant had breached O. 32 r. 13(2)(b) of the RHC in that the first defendant had failed to file and serve its affidavit in reply within 14 days from the date the plaintiff's supporting affidavit in encl. 6 was served on the first defendant. Here, encl. 11B was only served on the plaintiff some 77 days after the service of encl. 6 on the first defendant. To add insult to injury, the first defendant did not apply to the SAR, either orally or formally, for an extension of time to file encl. 11B.

(b) If it was argued that if encl. 11B, in so far as the first defendant was concerned, was purportedly filed by the first defendant in reply to the plaintiff's affidavit in reply in encl. 11A which was filed by the plaintiff in reply to the affidavit in reply by the second to the sixth defendants as seen in encl. 11, then my ruling would simply be this: the first defendant was not entitled to do so due to the fact that the first defendant was not a party to the exchanges of the affidavit in reply between the plaintiff and the second to the sixth defendants because the first defendant did not reply to the plaintiff's supporting affidavit in encl. 6.

Now in so far as encls. 11 and 11A are concerned, I say with a sense of thoroughness that the first defendant must be considered as a stranger and, consequently, the first defendant had no right to reply due to the first defendant's failure from the very beginning to reply to encl. 6. To allow the first defendant to join the wagon band, so to speak, at this juncture and to reply to the affidavit where the first defendant was not a party would be tantamount to opening the floodgates. Just imagine the following scenario: in cases where there are several defendants, a defendant who did not file any reply to the plaintiff's initial affidavit may subsequently, at his whim and fancy, join the other defendants to reply to the plaintiff's subsequent affidavit to which he was not a party – in utter disregard to the clear and unambiguous provisions of O. 32 r. 13(2)(b) of the RHC. In *Elite Jewellers Sdn Bhd v. Wong Tim Kai* [1998] 6 MLJ 511, at p. 517, I emphasised that:

> The business of this Court is to determine the meaning behind Order 32 rule 13(2)(b) of the RHC and nothing else. The plain, ordinary meaning of the words used in the RHC is to be adopted in construing the RHC unless it results in some form of absurdity.

Incidentally, to keep the record straight the case of *Elite Jewellers Sdn Bhd v. Wong Tim Kai (supra)* was also reported in two other popular local law journals, namely:

(1) [1998] 3 CLJ Supp. 115; and

(2) [1998] 4 AMR 3672.

The plain and ordinary meaning of O. 32 r. 13(2)(b) of the RHC meant that the first defendant having failed to reply to encl. 6 from the very beginning, had no more affidavit to reply to and so the subsequent affidavit of the plaintiff in encl. 11A that was not served on the first defendant but rather on the second to the sixth defendants, cannot be responded upon by the first defendant by way of encl. 11B. This was my judgment and I so hold accordingly. Without a doubt, the SAR had rightly excluded encl. 11B in so far as the first defendant was concerned.

Lest I be accused of an oversight, I will now endeavour to ventilate the arguments advanced by Mr. Wong Hau Lik, learned counsel for the first defendant, who argued and raised some pertinent points in delivering home the message that the appeal in encl. 29 should be allowed with costs. Mr. Wong Hau Lik argued that there were no express provisions in the RHC governing the time frame for filing and service of an affidavit in reply by the first defendant in regard to an O. 14 application. There was no merit at all to this argument. A string of cases governing the mode of interpreting O. 32 r. 13(2)(b) of the RHC have been reported in the local journals and I have alluded to these cases in the early part of this judgment, namely:

(1) *Wing Tiek Holdings Bhd v. Yong Chee Thiam & Anor (supra)*;

(2) *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong (supra)*; and

(3) *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors (supra)*.

Reliance was placed on the decision of Richard Talalla J (as he then was) in *PB Securities Sdn Bhd v. Abdul Rashid bin Mohamed* [1994] 3 CLJ 209; [1994] 2 AMR 33: 1694 where his Lordship held that the provisions of O. 32 r. 13(2) of the RHC did not apply to proceedings brought under O. 14 of the RHC or to affidavits filed or intended to be filed thereunder. But Shaik Daud J (now JCA) in deciding *Wing Tiek Holdings Bhd v. Yong Chee Thiam & Anor (supra)* considered *PB Securities Sdn Bhd v. Abdul Rashid bin Mohamed (supra)*, and this was what his Lordship said at p. 382 of the report:

> With respect I cannot agree with the views expressed in the above case (referring to *PB Securities Sdn Bhd*). The provisions of rule 2(3) of Order 14 to my mind are clear. It clearly states:
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> > The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day. (emphasis added).
>
> When a plaintiff files an Order 14 application, the registrar would give a return date. From the provisions of rule 2(3) above it seems clear as crystal that the summons and affidavit in support of the summons and any exhibits referred to must be served on the defendant four clear days from that return date. Rule 2(3) only applies to the affidavit in support which is to be served on the defendant but is completely silent as to an affidavit in reply by the defendant. It only talks of an affidavit in support of the Order 14 summons to be served on the defendant. In the light of this, it is my view that the service of the affidavit in reply by the defendant ought to follow the general

> procedure laid down in Order 32 rule 13(2)(b). Rule 13(2)(b) is also clear and particularly refers to the affidavit in reply. I am therefore of the view that it would be incorrect to say that rule 13(2) has no application to Order 14 proceedings.
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> In the present case since the affidavit in reply by the second defendant was filed and served on the plaintiff's solicitors on 8 June 1994, well beyond the 14-day limit provided for by rule 13(2), I hold that it had violated this provision. It is my view that pursuant to rule 13(2), all affidavits-in-reply to Order 14 applications must comply with Order 32 rule 13(2)(b), failing which they ought not to be considered.

Siti Norma Yaakob JCA speaking for the Court of Appeal in *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong (supra)* at p. 333 categorically approved the decision of Shaik Daud J (now JCA) in *Wing Tiek Holdings Bhd v. Yong Chee Thiam & Anor (supra)* and this was what her Ladyship said at p. 333 of the report:

> To that end we consider that the provisions of rule 13(2)(b) are applicable in proceedings for summary judgment under Order 14 and we confirm the finding reached in the *Wing Tiek Holdings Bhd* case to have correctly stated the law on the procedure to be followed in Order 14 proceedings *vis-a-vis* the applicability of Order 32, rule 13(2)(b) to such proceedings.

and I hasten to add that I am bound by the decision of the Court of Appeal and I too am of the considered view that Mr. Wong Hau Lik failed to peruse through the RHC and the law journals before advancing an argument that there was no time frame governing the filing and serving of an affidavit in reply in the RHC. Order 32 r. 13(2)(b) of the RHC must be applied vigorously in an O. 14 application.

Next, it was submitted on behalf of the first defendant that the White Book provided that the first defendant was only required to file his affidavit in reply in no less than three days before the return day. The answer can be found in our RHC itself. Order 32 r. 13 of the RHC was amended on 1 August 1993 by way of a PU(A) 192/93 by the addition of a new sub-r. (2) and this new amendment made it mandatory for legal practitioners to abide dutifully in regard to the time frame of filing and serving an affidavit in reply in the context of an O. 14 application, in particular *(Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors (supra))*.

Undaunted, it was next argued that the case of *Structural Concrete Sdn Bhd & 3 Ors v. Wing Tiek Holdings Berhad* [1997] 1 CLJ 300; [1997] 1 AMR 598, a decision of the Court of Appeal, was a case in point as it contained the *ratio decidendi* governing the present appeal. With respect, that case did not decide on the application of O. 32 r. 13(2)(b) of the RHC

to an O. 14 application. In fact, the Court of Appeal in that case ventured to interpret the provisions of O. 32 r. 13(2)(b) of the RHC in so far as the commencement of the computation of the 14 days' time frame was concerned. In *Structural Concrete*, the Court of Appeal had to consider the question of whether the 14 days would commence from the filing and service of the sealed or unsealed copy of the application and the affidavit on the party who intends to reply to it. Furthermore, factually speaking *Structural Concrete* can be distinguished from the present appeal. In the former, the Court of Appeal had to consider an application to set aside a judgment in default whereas the present appeal centred on an O. 14 application. In my judgment, *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong (supra)* and *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors (supra)* are relevant and should be followed dutifully as these two cases dealt with the provisions of O. 32 r. 13(2)(b) of the RHC in the context of O. 14 application whereas *Structural Concrete* considered O. 32 r. 13(2)(b) of the RHC in a different context in that it considered the commencement of the 14 days period in the light of the application to set aside the judgment in default. I need to add a caveat. It is this. Although O. 14 application was not an issue in the case of *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong (supra)* yet it had a high persuasive value and of relevance to the present appeal because the Court of Appeal in that case specifically considered the application of the provisions of O. 32 r. 13(2)(b) of the RHC in the context of O. 14 application. But when it was submitted that the Court of Appeal in *Pemunya Kapal MV Brihope & Ors v. Emmanuel E. Okwuosa & Or (supra)* did not address directly the issue of the application of O. 32 r. 13(2)(b) of the RHC to an O. 14 application, I must at once voice my dissent. Mahadev Sankar JCA in delivering the judgment of *Pemunya Kapal MV Brihope & Ors v. Emmanuel E. Okuwuosa & Ors (supra)* in clear simple language said at p. 466 of the report:

> On 6 May 1994, the crew filed an Order 14 application for summary judgment in the second action for the amount claimed, interest thereon and for an order that the ship be sold by public auction or private treaty to settle the plaintiffs' claims.

and I may add, even though that case was on admiralty matter, the general provisions of O. 32 r. 13(2)(b) of the RHC equally apply as the provisions are procedural in nature.

The present appeal was decided within a narrow compass. It confined itself to the question of whether the affidavit in reply in encl. 11B which was filed outside the 14 days' time frame as provided under O. 32 r. 13(2)(b) of the RHC was rightly excluded by the learned SAR in so far as the first

defendant was concerned. For the reasons adumbrated above, I ruled that the learned SAR had come to the right decision in excluding encl. 11B as far as the first defendant was concerned. There was no response at all by the first defendant in regard to encl. 6 – the supporting affidavit of the plaintiff to the O. 14 application in encl. 7. We have a situation as far as the first defendant was concerned, an encl. 6 that was not responded upon. Now, the basic principle of an evaluation of affidavit evidence where one party makes a positive assertion upon a material issue, and the failure of his opponent to contradict it is usually treated as an admission by him of the fact so stated (*Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 AMR 1174; [1995] 2 MLJ 287; [1995] 4 CLJ 339; and *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 CA). To allow the first defendant to reply to encl. 11A as submitted by the learned counsel for the first defendant would be to allow the first defendant to circumvent the settled principle in evaluation of affidavit evidence. This must not be condoned at all. It would simply open the floodgates for the indolent practitioners. How could the first defendant be allowed to reply to encl. 11A when in the first place the first defendant failed to reply to encl. 6?

Finally, still going on an uphill task, it was submitted on behalf of the first defendant that the onus was on the plaintiff to show cause as to why summary judgment should be given against the first defendant. In *Punca Klasik Sdn Bhd v. Seok Kim Low (supra)* at p. 416 thereof, I applied the decision of Seah FJ (as he then was) in the case of *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 FC and this was what I said (see p. 416 of the report):

> Seah FJ (as he then was) in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 FC, laid down the requirements for an Order 14 of the RHC's application in these words (page 301):
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> > For the purposes of an application under Order 14 the preliminary requirements are:
> >
> > (i) the defendant must have entered an appearance;
> >
> > (ii) the statement of claim must have been served on the defendant; and
> >
> > (iii) the affidavit in support of the application must comply with the requirements of rule 2 of the Order
>
> All these three requirements have been fulfilled in the present case and the onus was therefore shifted to the defendant to satisfy this Court why judgment should not be given against him. As Seah FJ (as he then was) said in the same case at page 302:

> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see Order 14, rules 3 and 4 (i)).

In my judgment, the plaintiff in the present appeal satisfied the preliminary requirements of O. 14 of the RHC as outlined by Seah FJ (as he then was) in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd (supra)*, and the onus must now be shifted to the first defendant to show cause why summary judgment should not be given against the first defendant.

Mr. Reginald Vallipuram, learned counsel for the plaintiff, conducted the appeal professionally befitting the status of a senior lawyer of the Johor Bahru Bar. He was thorough in his research and very refined at the Bar and with zest and gusto he urged this court to dismiss the first defendant's appeal in encl. 29 with costs. I did just that. Enclosure 29 should be dismissed with costs forthwith.